A

SEE TEOW GUAN & ORS v. KIAN JOO HOLDINGS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[COMPANIES (WINDING-UP) NO: D4-28-294-1994]
10 MARCH 2015

B

COMPANY LAW: *Winding up – Liquidator – Remuneration – Application for remuneration to be fixed on percentage scale basis – Whether in contravention to agreed time costs basis – Whether liquidators agreed for remuneration to be based on time taken, level of staff involved, nature and complexity of work involved – Consensus ad idem – Whether sum requested fair and reasonable – Whether application should be allowed – Companies (Winding-Up) Rules 1972, r. 195*

C

The liquidators of the first respondent ('liquidators'), *vide* a notice of motion, sought, pursuant to s. 232(3)(c) and 232(7) of the Companies Act 1965, an order that the sum of RM 16,958,368.72 be allowed as remuneration for the liquidators for the work and services rendered for the first respondent ('company') post winding-up. The liquidators had calculated the said sum based on the percentage scale basis pursuant to Table C of the Second Schedule, r. 195 of the Companies (Winding Up) Rules 1972. The liquidators contended that the said sum requested was fair and reasonable having regard *inter alia* to the (i) extensive and complex work involved; (ii) the assets involved; and (iii) the fact that the duration of the liquidation had been unduly protracted and prolonged for almost 18 years. However, the liquidators, in previous meetings with the contributories had represented that the liquidators' remuneration would be based on time taken, level of staff involved, nature and complexity of the work involved and not on the percentage scale basis. The issue that arose for the court's determination was whether the remuneration for the liquidators should be by way of percentage or otherwise.

D

E

F

G

Held (dismissing notice of motion):

(1) In the first meeting, the liquidators represented to the contributories that the liquidators' fees "would be based on the time taken, level of staff involved, nature and complexity of the work involved". There was no mention whatsoever that the charge would be based on percentage. The contributories in turn relied on the representation of the liquidators and resolved to pay the liquidators' bill based on time-costs basis and not otherwise. (paras 24 & 25)

H

(2) The liquidators without any hesitation forwarded the minutes of the first meeting to the contributories. As such, the representation the liquidators gave to the contributories as reflected in the minutes of the meeting regarding the payment that will be due to the liquidators were valid and binding, not only upon the contributories, but also upon the liquidators. (para 26)

I

(3) As it had already been decided by the liquidators themselves at the first meeting that their fees would be on time-costs and not percentage, there was no discussion whatsoever with regard to the liquidators' fees during the further two meetings. Both the liquidators and contributories in the two meetings had taken a stand not to raise a matter which had been resolved earlier. If the liquidators thought they had subconsciously said the wrong things to the contributories in the first meeting, they would have definitely tried to explain themselves in the subsequent meetings. Therefore, the liquidators meant every single word in the first meeting. (para 27)

(4) When the liquidators called for the fourth contributories meeting on 30 April 2009, the liquidators repeatedly without any reservation or qualification stated that the liquidators' fee would be based on time-costs basis. In fact, the liquidators at the fourth contributories meeting also confirmed that the total time-costs incurred up to 30 April 2009 would be in the region of RM5 million. The liquidators had instead filed the notice of motion that they be paid a sum of more than RM16 million based on a percentage scale basis. This was not only in contravention to the agreed time-costs basis as stated in the minutes of the first contributories meetings and the fourth contributories meeting, but it was also contrary to the common practice in Malaysia wherein liquidators are to be remunerated on time-costs basis rather than on percentage scale basis. (paras 28, 29 & 34)

(5) There was also an agreement by the liquidators and contributories that their fees would be on time-cost and not on percentage. The agreement was well cemented because the contributories were satisfied of this basis for the fees. Based on the agreement reached, both parties had proceeded accordingly towards effective post winding up of the company. Thus, the fees should be on percentage and not time-cost as it would be most unreasonable and unfair bearing in mind the *consensus ad idem* reached between the parties and the representation given by the liquidators. (para 36)

(6) Although the liquidators had put in many years of hard challenging work for the respondent, the liquidators were very experienced and were not new in companies' liquidation. Therefore, they could have easily anticipated the hard, protracted and testing work required for the respondent. They chose however not to charge on percentage basis but without reservation told the contributories their fees would be charged on time-costs. Therefore, the court could not be minded to grant the liquidators what they did not tell the contributories. (para 37)

A **Case(s) referred to:**
Perumahan NCK Sdn Bhd v. Mega Sakti Sdn Bhd [2006] 8 CLJ 355 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 232(3)(c), (7)
Companies (Winding-Up) Rules 1972, r. 195
B Rules of the Federal Court 1995, r. 137

For the liquidators - Rosli Dahlan (Bahari Yeow & Muhammad Daniel with him); M/s Lee Hishammuddin Allen & Gledhill
For majority contributories - V Sivaparanjothi (VK Lashmi & Mogan RK with him); M/s V Siva & Partners
C *For minority contributories - Izabella de Silva (Nur Azwa Fadzil with her); M/s Iza Ng Yeoh & Kit*

Reported by Sandra Gabriel

JUDGMENT

D **Abu Bakar Jais JC:**

Introduction

[1] The notice of motion of the liquidators of the first respondent ('liquidators') for determination is for this court to order that the sum of E RM16,958,368.72 be allowed as remuneration for the liquidators for the work and services rendered for the first respondent ('company') post winding-up.

Material Facts

F **[2]** The salient facts of this case can be gathered from the submissions of the parties. There is no reason to say that the same is not reflective of the facts material in arriving at the decision of this court. Hence the relevant facts are as follows.

[3] The liquidators pursuant to s. 232(3)(c) and s. 232(7) of the Companies G Act 1965 ask for the following orders:

(a) The remuneration of the liquidators for the period from 30 January 1996 to 25 January 2012 be allowed in the sum of RM16,958,368.72 as the liquidators' fees as at 25 January 2012 in respect of work and services rendered in:

H

(i) Disposing the assets of the company (namely the ordinary shares and warrants in Kian Joo Can Factory Bhd ('KJCFB') either collectively or separately) (assets) and/or work directly related thereto covering the period from 30 January 1996 to 25 January 2012; and

I

(ii) For services carried out for making various interim returns to the contributories of the company since the commencement of the winding up order on 30 January 1996 up to current date (totalling RM27 per share) and the proposed interim return of capital amounting to RM49 per share.

[4] In brief the liquidators contended:

(a) They have carried out extensive and complex work since the company was wound-up;

(b) The said fee requested for in this application is fair and reasonable having regard, among others:

(i) To the work and time involved in this engagement;

(ii) The scope of work performed;

(iii) The assets involved; and

(iv) The fact that the duration of the liquidation had been unduly protracted and prolonged for almost 18 years or close to two decades;

(c) Throughout the years of liquidation, a fairly large number of files and documents have been perused and/or generated and the liquidators have more than 200 files on hand in respect of the work done for the said periods;

(d) The work carried out during the periods mentioned by the liquidators and their representatives can be demonstrated through the following:

(i) The liquidators had prepared and filed voluminous affidavits and perused voluminous affidavits filed by the contributories (more than 150 affidavits) on the various proceedings initiated by the contributories;

(ii) The sale of assets exercises conducted by the liquidators whereby there were 26, 34 and 24 parties expressing their interests in the assets during the liquidators' sale of assets exercises held in 1999, 2007 and 2008 respectively. Each of these sale of assets exercises attracted two, four and three bidders respectively;

(iii) The settlement of list of contributories;

(iv) The four contributories meetings held to seek the wishes of the contributories;

(v) The 14 interim return of capital distributions made and the proposed 15th interim return of capital to be made.

[5] The liquidators submitted they and their representatives have expended much time and effort in the administration of this liquidation. The number of hours recorded by the liquidators and their representatives up to 25 January 2012 is in excess of 19,000 hours for this engagement. A minimum number of two and maximum number of 18 personnel (including the liquidators) were involved in performing the tasks at every point in time.

Nature Of The Assets/Commercial Decision

[6] The block of assets represents a controlling block held by the company in KJCFB (at the point when the assets were put up for sale in 2007 and 2008, it was equivalent to 34.64% of the total issued and paid up capital in KJCFB). In turn, KJCFB holds 54.8% in Box-Pak (Malaysia) Bhd. Essentially, the assets meant control over two listed entities. However, this also meant that the liquidators' actions in relation to the assets may affect a large number of stakeholders as the assets are price-sensitive with both companies being public listed entities, as the share market may react either positively or negatively on any news of the decision of the liquidators in respect of the assets.

[7] The liquidators say they had faced challenging situations in determining the manner and timing the assets of the company were to be dealt with as the liquidators were not in a position to know the vagaries of the economic scene and the share market and its future trends. It was also difficult for the liquidators to determine a point in time which would have the best outcome in the event of a sale of the assets.

[8] The liquidators contended they had exercised their commercial discretion in making various decisions from time to time and at the appropriate times throughout the liquidation which was deemed to be in the best interests of the company and its contributories. The liquidators say they had also taken into account the numerous factors and sought advice from solicitors and merchant bankers in respect of the appropriate manner in which the liquidators could deal with the assets which would be in the best interests of the company. In arriving at a decision concerning the assets of the company, the liquidators had taken into account, amongst others:

(i) The wishes of the contributories;

(ii) The prevailing share market conditions;

(iii) The interests of the company and its contributories as a whole for the company's assets to be sold in such a manner so as to secure the best possible price;

(iv) The advice of a merchant banker on how the liquidators could, in a sale of the assets, secure the best possible price for the assets and to secure the best possible premium for the assets over and above the market value of these assets at the prevailing time;

(v) The general intentions and common understanding of the members in the formation of the company ascertained from the memorandum and articles of association;

(vi) Various legal advice sought to assist the liquidators in arriving at a decision.

The liquidators say having due regard to the wishes of the contributories, the professional advice and the primary objective of the company, namely a maximisation of the return from a sale of the assets of the company, they had decided that it was in the best interests of the company to sell the assets in a manner that would secure the best possible price under all circumstances.

Disagreements Between The Contributories

[9] The two factions of contributories had always put forward two differing views as to the manner in which they wished for the assets of the company to be dealt with. The difference in number and value between the two factions was small namely:

(i) 52% in number and 55% in value of the contributories ('majority contributories') preferred a sale of the entire shares and warrants; and

(ii) 48% in number and 45% in value of the contributories ('minority contributories') preferred a distribution in specie of the shares;

[10] The decisions put forth by the liquidators could never be unanimously agreed upon by 100% of the contributories. Furthermore, any decision of the liquidators as to the manner the assets were to be dealt with were met with strong opposition from either the majority contributories or minority contributories or both parties.

[11] This was especially apparent when the majority contributories had all along voted in favour of a sale of the assets and the liquidators had proceeded with the sale exercise in 2008. However, upon the liquidators successfully awarding the tender to Can-One International Sdn Bhd ('Can-One') by way of a shares sale agreement dated 23 March 2009, all contributories had objected to the sale. The majority contributories had even commenced civil suit No. D-22-505-2009 against the liquidators requesting for an interim order to restrain the liquidators from proceeding with the shares sale agreement with Can-One. Although the High Court had on 25 September 2009 directed the completion of this agreement, the decision was reversed by the Court of Appeal. The liquidators had subsequently obtained leave to appeal the decision of the Court of Appeal on 21 December 2011 at the Federal Court. The Federal Court had on 5 January 2012 ordered the High Court orders to be restored and set aside the Court of Appeal orders. As such, the assets were only transferred to Can-One on 25 January 2012, upon resolution of the legal issues surrounding this sale. However, the majority contributories and some of the minority contributories continued to file to the Federal Court with applications to review the decision of the Federal Court pursuant to r. 137 of the Rules of the Federal Court 1995. The matter was dismissed by the Federal Court on 22 May 2013.

[12] These events posed tremendous challenges to the liquidators they submitted throughout the liquidation as to the manner in which the assets of the company were to be dealt with.

[13] The liquidators had even made applications to the court in 1996 and 2009 for the court's sanction and directions respectively in view of the challenges faced pursuant to the liquidators' decision to sell the assets.

[14] The liquidators say they had in the course of determining the course of action to be taken in dealing with the assets of the company in a manner which would be in the best interests of the company, had performed various analysis and sought professional advice to assist the liquidators, including professional advice from a Queen's Counsel, investment bankers and solicitors.

[15] Further:

(i) The assets of the company (namely the ordinary shares and warrants in KJCFB either collectively or separately) are price-sensitive;

(ii) The liquidators had faced challenging situations in determining the manner and timing the assets of the company were to be dealt with as the liquidators were not in the position to know the vagaries of the economic scene and the share market and its future trend;

(iii) In addition to the difficulties to determine a point in time which would have the best outcome in the event of a sale of the assets, the liquidators were faced with enormous challenges to have to deal with two factions of contributories who had always put forward differing views as to the manner in which they wished the assets of the company to be dealt with; and

(iv) The liquidators had exercised their commercial discretion in making various decisions from time to time and at the appropriate times throughout the liquidation which was deemed to be in the best interests of the company and its contributories. Any decision of the liquidators as to the manner the assets were to be dealt with were met with strong opposition which can be seen from the voluminous affidavits filed by the parties in this liquidation proceedings.

Findings Of Court

[16] First the governing statutory provision in respect of the liquidators' remuneration is s. 232(3) of the Companies Act 1965 that states:

> (3) A **liquidator** other than the Official Receiver shall be entitled to receive such salary or remuneration by way of **percentage or otherwise** as is determined:
>
> (a) by agreement between the liquidator and the **committee of inspection, if any**;
>
> (b) failing such agreement or where there is no committee of inspection **by a resolution passed at a meeting of creditors** by a majority of not less than three-fourths in value and one-half in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted to

vote, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or

(c) **failing a determination in a manner referred to in paragraph (a) or (b), by the Court.**

(emphasis added)

[17] Subsection (3)(a) and (b) is not applicable in this case as there is no committee of inspection and there is no resolution passed in a creditors' meeting. So only sub-s. (3)(c) applies in this case.

[18] Since only sub-s. (3)(c) applies, the court is given full discretion to decide whether the remuneration should be by way of 'percentage or otherwise'.

[19] Second it should be appreciated why the liquidators want their remuneration based on percentage. They want it so because they want RM16,958,368.72 as their remuneration which is based on percentage. They don't want it to be based on time-costs because if it is on time-costs they will only get around RM5 million for work up till 30 April 2009 as they themselves said in a meeting with the contributories. RM16,958,368.72 minus RM5 million is a whopping RM11,958,368.72. So as the saying goes, it all boils down to dollars and cents. Nonetheless, so be it if they deserve RM16,958,368.72 for the work they did. So the millions dollars question is - do they deserve RM16 million plus requested?

[20] The liquidators have calculated their fees based on percentage scale basis pursuant to Table C of the Second Schedule of the r. 195 of the Companies (Winding-Up) Rules 1972.

[21] On the 30 January 1996, the company was wound-up and on the same date the liquidators were appointed.

[22] As promptly as 13 days after the company was wound-up, the liquidators on the 12 February 1996 called for the first meeting with the directors and the contributories.

[23] Concerned, the contributories in this very first meeting through one of the contributories, one Ms Allice See specifically "enquired on the nature of charge of the liquidators fees". In response to this specific enquiry, the liquidators without second thought emphatically said that it "would be based on the time taken, level of staff involved, nature and complexity of the work involved".

[24] There is not a slightest doubt that in this first meeting the liquidators as clear as daylight represented to the contributories that the liquidators' fees "would be based on the time taken, level of staff involved, nature and complexity of the work involved". There is no mention whatsoever the

charge will be based on percentage. And everyone should note this is not small time liquidators. They are big time liquidators with vast experience from a reputable firm. They know what they were saying.

[25] The contributories in turn with glee relied on the representation of the liquidators and therefore resolved to pay the liquidators' bill based on time-costs basis and not otherwise. It is after all a cheaper proposition compared to percentage.

[26] Acting as competently as required and worth every salt of their appointment, the liquidators without considering it may be wise to ponder on what they had said to the contributories and without any hesitation but confidently forwarded the minutes of that meeting on the same day. The representation the liquidators gave to the contributories as reflected in the minutes of the meeting regarding the payment that will be due to the liquidators are therefore valid and binding not only upon the contributories but also upon the liquidators.

[27] Further on 12 July 1996 and 8 February 1996 there were meetings again between the two parties. As it has already been decided with open eyes by the liquidators themselves at the first meeting that their fees would be on time-costs and not percentage, there was no discussion whatsoever with regard to the liquidators' fees at these two meetings. Both the liquidators and contributories in these two meetings had taken a stand not to raise a matter which had been resolved earlier. If at all the liquidators intended not to charge their professional fees on a time-costs basis, obviously they could have discussed it in these two meetings but they did not. Or the very least if the liquidators thought that they were in clouded minds when they subconsciously said the wrong things to the contributories in the first meeting, they would definitely try to explain themselves in these subsequent meetings. They did not. Simply because that was indeed what they intended to say to the contributories and they meant every single word in the first meeting.

[28] This is further reinforced and pertinent to note that after 12 years later when the liquidators called for the fourth contributories meeting on 30 April 2009, the liquidators repeatedly without any reservation or qualification stated that the liquidators' fee will be based on time-costs basis.

[29] In this meeting the phrase "time-costs" was time and again mentioned by the liquidators without any reservation. In fact the liquidators at the fourth contributories meeting also confirmed that the total time-costs incurred up to 30 April 2009 would be in the region of RM5 million.

[30] The liquidators at the fourth contributories meeting even went on to state without any hesitation that from 15 July 2008 to 31 March 2009 the total time-costs incurred by the liquidators' team was approximately RM1

million. The liquidators at the fourth contributories meeting also explained that the said RM1 million also covers legal fees and for work done by the liquidators in respect of the third tender.

[31] At the fourth contributories meeting the liquidators also agreed that any billing would have to be taxed by the court and the liquidators advised that a formal copy of the time-costs printouts will be to the contributories.

[32] These facts are evident in the notes of the fourth contributories meeting dated 30 April 2009 which was forwarded to the contributories by the liquidators' solicitors Messrs Kadir Andri & Partners *vide* their letter dated 15 June 2006.

[33] On the request by the contributories at the fourth contributories meeting held on 30 April 2009, the liquidators without any protest or objection agreed to provide a formal copy of the time-costs printouts to the contributories. However to date the liquidators have failed and or refused to provide the said time-costs printouts.

[34] The liquidators now instead without any notice or warning have filed the notice of motion that they be paid a sum of more than RM16 million based on a percentage scale basis. This is not only in contravention to the agreed time-costs basis as stated in the minutes of the first contributories meetings held on 12 February 1996 and the fourth contributories meeting held on 30 April 2009 but it is also contrary to the common practice in Malaysia wherein liquidators are to be remunerated on time-costs basis rather than on percentage scale basis. This is decided by Ramly Ali J (now FCJ) in the case of *Perumahan NCK Sdn Bhd v. Mega Sakti Sdn Bhd* [2006] 8 CLJ 355; [2005] 7 MLJ 389 where it states;

> This is because petitioner's liquidators would be aware of the common practice in Malaysia by private liquidators to be remunerated on time basis rather on percentage basis contained in table C of the Second Schedule of the Companies (Winding Up) Rules 1972.
> [Emphasis Added]

[35] There is also on the balance of probabilities as reflected in the minutes of meetings between the liquidators and contributories, a strong representation that the liquidators' fee would be on time-costs and not on percentage.

[36] There is also an agreement by the liquidators and contributories when the former told the latter that their fees would be on time-cost and not on percentage. The agreement is well cemented because the contributories were satisfied of this basis for the fees and had not taken any steps to apply to remove and replace the liquidators which they are entitled to do. Whether they will succeed in so applying is something else but they have that right if they had not agreed to what was said by the liquidators. Both parties thus on the agreement reached had proceeded accordingly in the work towards

effective post winding-up of the company. For this court to now decide that the fees should be on percentage and not time-cost would be most unreasonable and unfair bearing in mind the *consensus ad idem* reached between the parties and the representation given by the liquidators.

[37] This court also does not dispute that the liquidators had put in many years of hard challenging work for the respondents. This court had taken note of this fact in deciding this case. The liquidators as said earlier, are very experienced. They are not new in companies' liquidation. Therefore they could have easily anticipated the hard, protracted and testing work required for the respondents. They chose however not to charge on percentage basis but without reservation told the contributories their fees will be charged on time-costs. This court therefore cannot be minded to grant them what they did not tell the contributories.

[38] Further even when the fees is charged on time-cost, it will run into a few millions ringgit. This is an undisputable fact by both parties. That is after all, in the opinion of this court a fair and reasonable amount of remuneration for the liquidators.

Decision

[39] Based on all the foregoing reasons, with respect the notice of motion of the liquidators is dismissed.